No. 103.

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Supreme Court of the United States.

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OCTOBER TERM, 1901.

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FIRST NATIONAL BANK OF LAKE BENTON, MINNESOTA,

Plaintiff in Error,

vs.

JOHN W. WATT,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

F. L. JANES,
Counsel for Defendant in Error.

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STATEMENT OF FACTS.

As stated by plaintiff in error in its brief, this was an action brought originally in the District Court of Lincoln County, Minnesota, by defendant in error vs. plaintiff in error, for the purpose of recovering back, under sections 5197 and 5198 of the Revised Statutes of the United States, the sum of about $323.00, being twice the interest paid on a promissory note alleged to

be usurious. After verdict in favor of the plaintiff, appeal was taken from an order denying a motion for a new trial to the Supreme Court of the State of Minnesota. That court having affirmed the original order, the case is now brought by writ of error to this court.

The amount which the plaintiff was allowed to recover in both the District and Supreme Court of Minnesota, was double the entire interest which had been paid under the contract.

Watt vs. First Nat'l. Bank of Lake Benton, 76 Minn. 458, and 79 Minn. 266.

ARGUMENT.

The only question in this case is one of statutory construction, and that is whether the amount which may be recovered back is twice the entire interest paid or merely double the excess of the interest over the legal rate. The Revised Statutes of the United States, sections 5197 and 5198, provide:

"Sec. 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the state, territory or district where the bank is located, and no more."

"Sec. 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be

deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same."

Under the banking law of February 25th, 1863, United States Statutes—usury forfeited the entire loan or debt. This, however, was deemed too severe by Congress hence the act of 1864 was enacted which contains the foregoing sections.

Sec. 5197 limits the rate of interest to that allowed by the law of the state, territory or district where the bank is located.

Under Sec. 5198 two categories are defined and the consequences denounced.

1. Where illegal interest has been *knowingly* stipulated for, but *not paid*, there only the sum lent without interest can be recovered.

Lucas vs. Bank 78 Pa. St. 231.

Bank vs. Karmony 98 Pa. St. 65.

Gutherie vs. Reid 3 National Bank Cases 753.

Brown vs. Marion National Bank 169 U. S. 415.

It is well settled law that where a National bank takes, receives or charges more than the legal rate of interest on the discount of the note, the interest bearing power of the note is destroyed. It is a dead note

thereafter so far as interest is concerned, not only is the usurious interest forfeited but the interest accruing by law thereafter is forfeited and the bank cannot recover more than the face of the note.

Alves vs. Henderson 3 National Bank Cases 452.

Petersborough National Bank vs. Childs ib. 469.

2. Where the greater rate of interest *has been paid*, then twice the amount of the entire interest so paid can be recovered in a penal action of debt or suit in the nature of such action against the offending bank brought by the person paying the same or his legal representative.

The great weight of authority of both the Federal and State Courts affirms this second proposition and it has been uniformly held that in an action against a National bank, which has received usurious interest, for twice the interest paid, the recovery is of twice the entire interest paid and not merely of double the excess of interest over the legal rate.

Hill vs. Nat'l Bank of Barre, 15 Fed. Rep. 433 (Cir. Ct. Vermont.)

Crocker vs. First Nat'l Bank, 4 Dill. 358 (I Nat'l Bank Cases 317.)

Nat'l Bank of Madison vs. Davis, 8 Bis. 100 (I Nat'l Bank Cases 350.)

Lebanon Nat'l Bank vs. Karmony, 98 Pa. St. 65. (III Nat'l Bank Cases 746.)

Schuyler Nat'l Bank vs. Bullong, 24 Neb. 825. (III Nat'l Bank Cases 561.)

Bank vs. Garlinghouse, 22 Ohio, St. 492.

Bank vs. Overholt, 96 Pa. St. 329.

Bank vs. Trimble, 40 Ohio St. 629.

Louisville Trust Co. vs. Kentucky Nat'l Bank, 87 Fed. Rep. 143, and also in 102 Fed. Rep. 442.

Bank vs. Moore, 2 Bond 174.

43 Pac. Rep. 839 (Kan.)

42 Pac. Rep. 936 (Kan.)

Boerner vs. Trader's Nat'l Bank,

39 So. W. Rep. 285 (Tex.)

Colgin vs. City Nat'l Bank,

40 So. W. Rep. 634 (Tex.)

40 So. W. Rep. 903 (Ky.)

22 South Rep. 518 (Ala.)

Usury was an offense at common law, and the usurer was not only punished by the Censures of the church in his lifetime, but was denied a Christian burial; and by the laws of Alfred the Great, and Edward the Confessor, if, after death even, a man was found to have been a usurer, his goods were forfeited to the crown, and his lands to the lord of the fee.

Under Henry VIII a statute was enacted revising the former laws and is the foundation of all statutes prohibiting usury.

Subsequently an act, Statute 12, Anne, was enacted which remained the law in England until the Statute of Usury was repealed by Statute 17 and 18 Vict. and the parties left to make whatever contract they chose in respect to interest.

Under Statute 12 Anne the rate of interest was fixed

at 5 per cent. and the taking, etc., of a greater rate was punished by a forfeiture of the entire debt, and it was at one time held in England that the borrower was in *pari delicto* with the lender and therefore could not recover back usury voluntarily paid, but this doctrine was finally repudiated. Clarke vs. Shee, Cowp. 200.

From this brief history of the law of usury it is apparent that the act of Congress of February 25th, 1863, forfeiting the entire debt for its violation but reenacted the common law and when Congress deemed the penalty too severe repealed the provision forfeiting the entire debt and left the Statute as we now find it. They simply reduced the penalty to the usurer.

Surely the construction of said Sec. 5198, as placed on it by the learned courts in the many decisions before cited, and as contended for by the defendant in error, cannot be said to be a "wide departure from the established" law or practice.

The statute in question is remedial as well as penal and is to be liberally construed to effect the object Congress had in view in enacting it. In Ordway vs. Central National Bank of Baltimore, 47 Md. 217, the court says in construing this section: "The cause of action is a forfeiture or penalty of a civil nature, for the exacting and taking of usurious interest upon money loaned and the remedy given by statute, is by a private civil action of debt to the party grieved. The government or the public is not concerned with

it. It is, therefore, a private right pursued by a private civil action, and it has been decided that the section upon which the action is founded, is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it," and cites Farmers', etc., National Bank vs. Dearing, 91 U. S. 29. See also, Gray vs. Bennett, 3 Met. 522. But we do not consider that the question whether this statute is one to receive a liberal or a strict construction can be of any avail to the usurer. The statute is plain and unambiguous. This action is brought upon the second clause of section 5198. The highest lawful rate of interest in Minnesota is ten per cent and the plaintiff paid about sixteen.

We cannot find nor can we suggest any clearer exposition of the statute in question than to use the words of *Wheeler, J.*, in Hill vs. National Bank of Barre, *supra:*

"The whole section must be read together to ascertain the meaning of this clause. The first clause provides that the taking, receiving, reserving or charging a rate of interest greater than is allowed by law shall be deemed a forfeiture of the entire interest. Here there is no distinction of the excess of the legal rate over the rest; then the clause in question proceeds to provide that in case the greater rate of interest has been paid the person by whom it has been paid may recover back twice the amount of the interest thus paid. The continuing the exaction till it had accom-

plished the payment of the amount exacted is a greater offense than the mere stipulating for the payment, and would be treated with greater severity. The first clause seems to be intended for the punishment of the latter offense and the second for that of the former. The greater rate in the second clause is the same as a rate of interest greater in the first; and the amount of the interest thus paid in the second is the same entire interest mentioned in the first. The difference between the offenses is the difference between exacting an agreement to pay and exacting actual payment, and the difference between the consequences imposed is the liability to lose once the interest in the former case and twice the interest in the latter."

And *Mitchell, J.*, in deciding this case, see 76 Minn. 459, says: "It would be extraordinary if Congress intended to provide for a forfeiture of all interest when no usury has been paid, but allow a recovery of double the excess over legal interest when the interest has been paid. The word "rate" is evidently used in the same sense in both clauses of section 5198. "Greater rate" in the second clause is the same as "a rate greater" in the first clause, and "the amount of the interest thus paid" in the second is the same as "the entire interest" in the first. The entire interest forfeited is just the rate which was contracted for. Upon payment of "a greater rate" than is lawful, "twice the amount of the interest thus paid" is twice the entire interest. To say that only a part of the greater rate (that is, the excess over the lawful rate) is the

amount which can be recovered back would be to do violence to the plain language of the statute."

The Court's attention is called to the reasoning in Brown vs. Marion Nat'l Bank, 169 U. S. 415, wherein the foregoing construction is substantially followed.

As has been before stated, if the borrower does not pay the note containing usurious interest and an action is brought by the bank on the note, the bank will forfeit the *entire interest* under the statute. It necessarily follows from this that if the theory as contended for by plaintiff in error is the correct one, it would make the consequences of *agreeing to take* greater than the *actual taking* in most cases, for the loss of the entire interest would be greater than the loss of twice the excess unless the excess should equal or exceed half the rate stipulated for, which would not be usual. We do not believe that the maker who pays the usurious note under the statute, is in a worse position than he who does not pay.

Some courts have construed the Statute in accordance with the contention of plaintiff in error.

In Hintermister vs. Bank, 64 N. Y. 212, *Allen, J.*, who delivered the opinion seemed to be endeavoring to find an avenue of escape from the penal clause of the statute creating a double liability of both interest and usury and says that "the language of the act is satisfied by restricting it to a recovery of double the interest paid in excess of the legal rate" and concludes that he arrives at such conclusion with "*great hesitation*" and cites Brown vs. Second National Bank, 72 Pa. St. 209, as an authority for his conclusion, but

from an examination of this case it is apparent that the court therein does not pass upon the question. And in Lebanon vs. Karmony, 98, Pa. St. 65 the court holds adversely to the contention of plaintiff in error and does not even refer to Brown vs. Bank, *supra*.

Bobo vs. Peoples' National Bank, 21 S. W. R. 888 (Tenn.) follows the Hintermister case and cites Brown vs. Bank, *supra* as a case in point.

The courts of two other states, South Carolina and Alabama have followed the Hintermister New York case. Certainly it cannot be very cogently urged that a decision arrived at "with great hesitation" and a decision that does not decide the question at all are very valuable as precedents to be followed by the courts of Tenn., South Carolina and Alabama.

Counsel for plaintiff in error seem to be especially gratified with the decision of this court in National Bank vs. Johnson 104 U. S. 271.

That was an action brought in the Supreme Court of New York to recover double the excess $2735.36 charged above the legal rate of interest by the bank and paid by Johnson. Judgment was entered for $5470.72, twice the amount of such excess to reverse which a writ of error was prosecuted. The decree of the lower court was affirmed. The counsel followed the New York rule as announced in the Hintermester case, and it was conceded that the proper measure of damages had been given, at least that question was not raised or discussed by counsel or passed on by this court, in so far as the reported decision discloses. This decision is as valuable in fixing the construction

of the statute as is First Nat'l Bank of Charlotte vs. Morgan, 132 U. S. 141, which was an action brought under sections 5197 and 5198 in the State court of North Carolina, by Morgan, to recover from said bank twice the *amount* of the interest paid on alleged usurious contracts. The jury in response to issues submitted to them found that Morgan had paid on the usurious contracts the sum of $554.28, and returned a verdict against the bank for twice that sum. Judgment was accordingly rendered in favor of Morgan, and the judgment having been affirmed by the Supreme Court of North Carolina was remanded to this court by writ of error. The question as to the proper measure of damages, was not raised by counsel or passed upon by this court, the only question submitted being one of jurisdiction, that of the State Court to take cognizance of the action. The counsel conceded that if plaintiff was entitled to recover at all it was for double the amount of the entire interest paid.

See also National Bank of Daingerfield vs. Ragland 181 U. S. 45, where double the entire interest paid was recovered and such rule of damages was not questioned in this court and the decision of the State Court of Texas was affirmed.

It is urged by counsel for plaintiff in error that National banks have always been regarded by both Congress and this court as national favorites and suggest that it may have been the intention of Congress, in view of such policy, to allow these banks a *locus poenitentiae*. While it is true that a bank like a person is subject to repentance and reformation and the

strong power of Congress should not be denied to it in its honest efforts to reform and purge its contracts of usurious interest, yet we submit that when a contract is fully executed, that is, the bank has received from the borrower full payment of its principal and usurious interest, the day for repentance has passed, and the bank's plea for mercy should be denied.

The bank has the matter, as it were, entirely in its own hands; after usury has been contracted for and before payment, the bank can if it wishes to repent and accept the principal loaned without subjecting itself to any penalty the avenue is open and clear for it to do so, but if it postpones the day of repentance and exacts payment of the principal, interest and usury it subjects itself to the penalty of the statute and it is too late for it to repent. If on the other hand, as suggested by counsel for plaintiff in error, a premium would be placed upon compliance with the usurious contract on the part of the debtor and that it would be financially beneficial to him to carry out such a contract, then the bank can refuse to accept only the principal and legal interest, and thus put it beyond the power of the debtor to make money out of the transaction. The bank is the arbiter of its own fortune. If it keeps within the law it does not suffer—if it violates the law the penalty it must suffer is measured by its own avarice and greed; it imposes its own penalty or fine, not the court.

Respectfully submitted,

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